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DECISION



21094

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-204246

DATE: March 11, 1982

MATTER OF: Security Assistance Forces & Equipment OHG

DIGEST:

Contracting officer's inquiry as to whether firm's initial offer was its best and final offer afforded firm an adequate opportunity to submit a best and final offer; firm's protest that it was not requested to submit a best and final offer is denied.

Security Assistance Forces & Equipment OHG (SAFE) protests the award of a contract to Telefonbau und Normalzeit Lehner & Co. (T&N) under solicitation No. DAJA37-81-R-0760 issued by the United States Army Contracting Agency, Europe. The contract is for an electronic time signal system. SAFE maintains that, unlike the awardee, it was not given an opportunity to submit a best and final offer, following the submission of its initial proposal. For the reasons stated below, the protest is denied.

The solicitation was issued on July 9, 1981. Section H-1 of the solicitation required delivery of the time signal system to be made two weeks after the contract was awarded. Offers were received from T&N and SAFE; T&N's offer was \$17,099.49, while SAFE's offer was \$18,548.50. Both offerors took exception, however, to the required delivery schedule. T&N indicated that delivery of the system would be made four months after contract award except for the tone generator which would be made six months after contract award. SAFE, on the other hand, did not propose a specific delivery schedule but instead merely indicated that it would have trouble meeting the required schedule and that it understood, based on conversations with an Army employee, that delivery was not critical.

On July 21 an Army contract specialist telephoned SAFE and spoke to SAFE's managing partner, Mr. E.J.P. Tierney. The contract specialist asked Mr. Tierney if SAFE's initial offer was its best and final offer. The Army and SAFE do not agree as to Mr. Tierney's response. SAFE contends that Mr. Tierney responded that SAFE's offer was "the only offer we've been asked for"; however, the contract specialist states that Mr. Tierney laughed and stated that the offer "was the only offer we've got." The parties agree, however, that the contract specialist and Mr. Tierney then discussed the need for more specific delivery information. The parties further agree that Mr. Tierney indicated he would check with the manufacturer of the time signal system and agreed that he would provide more specific information by telex as soon as possible.

The contract specialist also telephoned T&N to ask if that firm's offer was its best and final offer. A representative of T&N indicated that it was and agreed to verify that fact by telex.

Later that day telex responses were received from T&N and SAFE. T&N confirmed that its initial proposal was its best and final offer. SAFE indicated that delivery of the time signal system would be no later than August 24 if an award was received by July 24 and four to six weeks after contract award if an award was received after July 24. After verifying that T&N's proposed delivery schedule was acceptable to the user activity, the Army made an award to T&N on July 27.

SAFE maintains that unlike the awardee, it was not requested to submit a best and final offer following the submission of its initial offer. SAFE contends that the contract specialist merely asked Mr. Tierney whether SAFE's offer was its best and final offer. The protester argues that in view of SAFE's response, the contract specialist had a duty to specifically request SAFE to submit a best and final offer and that the contract specialist's queries regarding SAFE's proposed delivery schedule did not satisfy that obligation. SAFE further argues the Army failed to

comply with Defense Acquisition Regulation (DAR) § 3-805.3(d) (Defense Acquisition Circular 76-7, April 29, 1977) which requires that oral requests for best and final offers be confirmed in writing and that this failure is sufficient to sustain its protest.

The Army acknowledges that it failed to comply with DAR § 3-805.3(d) and indicates steps will be taken to avoid a recurrence of this situation. The Army disagrees, however with SAFE's assertion that it was not requested to submit a best and final offer or that the Army's failure to make the request in writing provides a basis for sustaining the protest.

The Army asserts that even SAFE's version of the conversation between Mr. Tierney and the contract specialist indicate that SAFE was given an opportunity to submit a best and final offer. The Army argues that Mr. Tierney has had "considerable experience in contracting with the Government" and was clearly placed on notice by the contract specialist's call that it should submit its best price if it had not already done so. The Army further argues that its failure to comply with DAR § 3-805.3(d) was not prejudicial to SAFE since it is clear that it was given an opportunity to revise its offer.

We do not agree with SAFE's assertion that it was not given an opportunity to submit a best and final offer following the submission of its initial offer. In our opinion, the contract specialist's query regarding whether SAFE's initial offer was its best and final offer was sufficient to place SAFE on notice that it was being requested to submit a best and final offer.

The protest is denied.

Shilton J. Aorolan
for Comptroller General
of the United States